The Minimum Income Requirement for Family Settlement: The Cost of Integration.

Introduction

The minimum income requirement (MIR) for UK sponsors of non-EU national partners has been persistently challenged since its introduction in July 2012,[1] most notably in *MM and others.*[2] The rule introduces a requirement for the UK sponsor to earn a minimum gross income of £18,600, more if children are involved,[3] alone or in combination with significant savings. This has prevented many British citizens from being able to settle with their partners in the UK and been challenged under Article 8 of the European Convention on Human Rights (ECHR). The discriminatory nature of the rules was condemned in the High Court[4] but was reversed by the Court of Appeal.[5] On further appeal to the Supreme Court the matter has been settled in favour of the Secretary of State. Here, after extensive concessions from the Secretary of State, the rules relating to minimum income were held to be lawful in principle, and compatible with Article 8 ECHR. However, despite this decision the rules were found to be deficient in their disregard for the s55 Borders, Citizenship and Immigration Act duty concerning the best interests of children. Additionally, the Secretary of State was ordered to reconsider the family migration rules, which prohibited consideration of income from third parties or the incoming partner.

The Supreme Court's decision could be viewed as an attempted compromise.[6] This was only made possible, however, by a significant change in the Secretary of State's position. Previously determined to influence judicial decision making using the immigration rules, it was accepted that they only formed part of the assessment and

[1] Appendix FM and Appendix FM-SE Immigration Rules, Home Office: *https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members* [Accessed 19 October 2017]; *https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-se-family-members-specified-evidence;* [Accessed 19 October 2017].
[2] *R (on the application of MM (Lebanon) and Others) (Appellants) v Secretary of State for the Home Department (Respondent)* [2017] UKSC 10.
[3] E.C.P. 3.1 (a) Appendix FM.
[4] *MM, R (On the Application Of) v The Secretary of State for the Home Department* [2013] EWHC 1900 (Admin).
[5] *MM (Lebanon) and Others, R (on the application of) v Secretary of State for the Home Department* [2014] EWCA Civ 985.
[6] Although not going far enough in addressing the criticisms of the MIR itself. See Helena Wray, "The MM Case and the Public Interest: How did the Government make its Case?" (2017) 31 IANL 227-243, 243.

that other factors could be considered in 'exceptional circumstances'.[7] Furthermore, the recent changes to the rules[8] and guidance,[9] permitting other sources of income and accounting for children's best interests, are not as radical as many anticipated. Significant discretion is given to decision-makers to interpret indefinite concepts such as "exceptional circumstances" and "unjustifiably harsh consequences."[10] Such provisions are likely to result in further challenges and continued uncertainty for applicants under the rules.

This article is in four main parts. It will start by outlining the context in which the MIR was introduced. Secondly, it will consider the case of *MM and Others* and, thirdly, assess the consequences of this decision. The final section will consider the amended immigration rules and updated guidance implementing the decision. The Government's position throughout has been to argue that the MIR is necessary to promote integration and reduce net migration. Whilst family migration has been restricted,[11] what has emerged in the Secretary of State's submissions displays a narrowly focussed understanding of the complex relationship between income and integration. In particular, it ignores the extent to which the application of the MIR divides families rather than uniting them. The attempts to justify the provisions as promoting integration are, therefore, called into question.

[7] *MM and Others* (Supreme Court) fn.2 paras 62-68 [Lady Hale and Lord Carnwath].
[8] See Gen 3.1 – 3.3 Appendix FM; Section A1 1 (1) (b) and (c) Appendix FM-SE; Section 21A Appendix FM-SE.
[9] Home Office*, Immigration Directorate Instruction Family Migration: Appendix FM Section 1.0a Family Life (as a Partner or Parent): 5-Year Routes* October 2017: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/652268/appendix_fm_section_1_0a_family_life_as_a_partner_or_parent_5_year_routes_october_2017.pdf* [Accessed 7 November 2017].
[10] See paras 13.2 to 13.6 *Immigration Directorate Instruction Family Migration,* fn 9.
[11] The Impact Statement suggested that approximately 45 per cent of sponsors sampled were not in employment or earned less than £18,600 per annum. Furthermore approximately 40-45% of UK residents, from which sponsors are drawn, earn less than the MIR. Home Office, *Changes to the Family Migration Rules: Impact Assessment, IA No. HO0065,* 12 June 2012: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257357/fam-impact-state.pdf* [Accessed 7 November 2017].

The Context for the Minimum Income Requirement

The History of The Minimum Income Requirement

The minimum income requirement (MIR) was a major feature of the changes implemented in June 2012.[12] The £18,600 maintenance requirement for a couple wishing to settle in the UK must be the income of the party or parties living in the UK.[13] A couple with one child need to show an additional £3,800, and an extra £2,400 is required for each further child.[14] If these requirements cannot be met with income, savings below £16,000 are not considered. Savings over £16,000 must be coupled with a further amount of two and a half times the difference between the income figure required and the lesser amount earned.

These changes replaced a previous maintenance requirement that a family should be able to maintain themselves and any dependents adequately without recourse to public funds.[15] This was commensurate with a similarly constituted family receiving income support, net of rent, to account for the provision of housing benefit.[16] To require more than this suggests that a family on income support is not adequately maintained.[17] The current income support level for an adult couple stands at £5,972.20 per annum,[18] although the addition of rent may bring it closer to the current threshold. However, young couples often live with parents or other relatives rent-free, and in these circumstances would have to earn significantly more than previously. The figure is also much more than the national minimum wage of £14,250.60 per annum for a standard full-time position.[19]

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[12] Statement of Changes in Immigration Rules, HC 194, 13 June 2012: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284574/hc194.pdf [Accessed 28 April 2018]. Appendix FM and and Appendix FM SE introduced significant amendments to the rules on family migration (HC 395). They apply to entry clearance and leave to remain applications made by partners of British citizens, refugees or other settled persons on or after 9th July 2012.

[13] E-ECP 3.1 a (i) Appendix FM.

[14] E-ECP 3.1 a (ii) and (iii) Appendix FM.

[15] Rule 281 (v) HC 395.

[16] *Uvovo* 00TH01450, *KA (Pakistan)* [2006] UKIAT 00065.

[17] *KA and Others (Adequacy of Maintenance) Pakistan* [2006] UKAIT 00065 [7].

[18] https://www.gov.uk/income-support [Accessed 2 May 2018].

[19] Based on an hourly rate of £7.83 at 35 hours a week: https://www.gov.uk/national-minimum-wage-rates [Accessed 2 May 2018].

Statistically, grants of entry visas to partners have declined since the implementation of the rules. In the year ending June 2010 the Home Office received 43,774 partner entry clearance applications and made 37,004 grants in this category. In the year ending June 2011, the Home Office statistics record 43,974 partner applications being made and 35,991 grants. Similarly, in the year before the immigration rule changes, 42,222 partner applications were made and 33,905 granted. This is significantly more than the 31,838 applications and 24,517 grants in the year ending June 2013; 32,331 applications and 26,037 grants in the year ending June 2014, and 36,143 applications with 27,345 grants in the year ending June 2015.[20] The slight increase in grants after the initial drop in 2013 could perhaps be attributed to familiarity with the rules and families making adequate financial arrangements to meet them. The overall reduction is still substantial, however, and indicates that fewer couples are meeting the immigration rules than previously. Changes to the English language requirement in November 2010[21] may also have had an impact, but the decline is more significant from 2013 onwards.

The changes were questioned by immigration campaigners,[22] practitioners[23] and judges.[24] The amendments were justified on the basis of advice received from the Migration Advisory Committee (MAC) that the minimum gross annual income for sponsoring a partner, without dependants, should be set between £18,600 (the level at which in most cases a couple receive no income-related benefits) and £25,700 (the level at which the sponsor is a net contributor to the public finances).'[25] In making its recommendations, however, the MAC was responding to a request to

[20] Table fa_02: Family partner entry clearance visa applications and resolutions, Home Office: https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2016/family [accessed 28 May 2018]. Some of the grants could have been from earlier applications. The resolved rates were, however, fairly similar to the application rates. These statistics relate to entry clearance applications only.

[21] *Immigration Directorate Instruction Family Migration: Appendix FM section 1.21 English Language Requirement – Family Members under Part 8, Appendix FM and Appendix Armed Forces*, April 2017, para 1.1: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605687/Appendix_FM_Section_1.21.pdf [Accessed 18 May 2018].

[22] See Joint Council for the Welfare of Immigrants, *United by Love, Divided by Law: http://www.jcwi.org.uk/sites/default/files/UBLfinal.pdf* [Accessed 26 October 2017];

[23] See Immigration Law Practitioners Association, *UK Border Agency: Family Migration, a Consultation, Response from Immigration Law Practitioners Association (ILPA),* 13 October 2011: *http://www.ilpa.org.uk/data/resources/13813/11.10.13-Family-Migration-response.pdf* [Accessed 24 October 2017].

[24] See *Statement of Changes in Immigration Rules, Motion of Regret*, Hansard, HL Deb, 23 October 2012, vol 740, part 53, cols 179-200: *http://www.publications.parliament.uk/pa/ld201213/ldhansrd/text/121023-0002.htm#12102355000231* [Accessed 2 November 2017].

[25] Home Office, *Statement of Intent: Family Migration*, June 2012, para 73: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257359/soi-fam-mig.*pdf [Accessed 24 October 2017].

advise on the minimum amount a sponsor *should* earn to support his or her partner independently, without burdening the state,[26] rather than whether a minimum income threshold effectively balanced family life and the economic wellbeing of the country.[27] A fixed minimum income policy was non-negotiable; it was simply a question of how much it would be.[28] Despite these limitations on the review framework, both the Court of Appeal and Supreme Court relied heavily on the findings to support conclusions that the rules were compatible with Article 8. The MAC's report was described by Lady Hale and Lord Carnwath as "a model of economic rationality" and, whilst conceding that certain assumptions were made by the Committee, it was maintained that they carefully identified and rationalised them.[29]

The use of third party support[30] was restricted on implementation of the rules, and reliance on current and potential income of the immigrant partner, entering the UK from abroad, was prohibited.[31] This change was made despite the finding of the Supreme Court in *Ahmed Mahad*[32] to allow third party support: Under the earlier provisions, provided there was no recourse to public funds, other income sources were permitted.[33] Recent amendments to the immigration rules revert to permitting third party support, but only in exceptional circumstances:[34] Stringent requirements must be met to take advantage of these new provisions.[35]

The introduction of the MIR was accompanied by detailed evidential provisions,[36] a new requirement that the relationship must be genuine and subsisting and a longer route to settlement for spouses or partners.[37] An exception to meeting the MIR was also introduced with the rules, but this relates to leave to remain applications only

[26] Motion of Regret, col 181, Baroness Smith, fn. 24.
[27] As required by Article 8 ECHR. See, for example*, R (Razgar) v Secretary of State for the Home Department* [2004] UKHL 27*; Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11.
[28] Motion of Regret, col 181, Baroness Smith, s fn.24.
[29] *MM and Others* (Supreme Court) fn.2 [83] [Lady Hale and Lord Carnwath].
[30] Where couples could rely on financial assistance from family or friends to help maintain themselves at the appropriate level.
[31] S1 (1) (b) and (c) Appendix FM-SE.
[32] *Ahmed Mahad (previously referred to as AM) (Ethiopia) and others v Entry Clearance Officer* [2009] UKSC 16.
[33] See fn.32. [51] (Lord Kerr).
[34] Para 21A Appendix FM SE.
[35] This is discussed in detail later on in the article.
[36] Appendix FM SE see fn.1.
[37] Partners now have to complete 5 years leave to remain (formerly two) before they can apply for indefinite leave to remain: Section E-ILRP Appendix FM. If they do not meet the requirements of the rules but meet an exception, the route to settlement is ten years.

and is restrictive in its remit.[38] As a package of measures, the changes severely curtailed the rights of British citizens to live in the UK with their international partners, ignoring emerging global trends of increased social and cultural diversity and concentrating on economic concerns.[39] The measures prioritised the economic well-being of the country over the family life of British citizens and other settled persons, and attempted to curb the decision making powers of the courts. The Secretary of State claimed that these provisions would "correctly balance" these competing considerations in making decisions on Article 8 matters.[40] But many strong family life claims fall outside the remit of the rules. While public interest matters legitimately permit interference with Article 8 rights, evaluating proportionality is traditionally a matter for the courts, and executive inroads into this assessment restrict judicial independence.

Criticisms of the MIR

The restrictive nature of the MIR and accompanying provisions caused hardship to a significant number of applicants, leading them to challenge their lawfulness. During the consultation process, strong objections were raised regarding the need for a minimum income and the evidence justifying its inception.[41] The former income support level used was deemed acceptable and increases to this threshold would 'disadvantage families of modest means, potentially leading to the ongoing separation of close family members.'[42] In justifying the higher threshold, the Home Office claimed that partners relied on public funds during the initial period of leave to remain. When asked for evidence to support this, the Immigration Law Practitioners Association (ILPA) was told that this information was unavailable.[43] The restrictions on considering other sources of income were questioned, particularly the sole focus

[38] Section EX 1 Appendix FM provides an exception to meeting the rules for partners in a genuine and subsisting relationship where "insurmountable obstacles" prevent removal. It also advantages those with British citizen children or children who have lived in the UK for 7 years, if removal is considered to be unreasonable.
[39] See G. Manning, "Integration or Segregation? Changes and Challenges to the Rules on Family Migration" (2013) S.L. Rev., Vol. 70, 44-50, 45.
[40] *Explanatory Memorandum to the Statement of Changes in Immigration rules Presented to Parliament on 13 June 2012 (HC 194),* para 2.1: *https://www.gov.uk/government/publications/statement-of-changes-to-the-immigration-rules-hc194-june-2012* [Accessed 26 October 2017].
[41] See objections from ILPA , fn.23 and JCWI, fn 22.
[42] Liberty's Response to the Home Office's consultation on Family Migration, October 2011, para 30: https://www.libertyhumanrights.org.uk/sites/default/files/liberty-s-response-to-the-home-office-s-family-migration-consultation-oct-11.pdf [Accessed 4 May 2018].
[43] See ILPA's response fn.23, p12.

on the sponsor's income for entry clearance cases, disregarding the potential earnings of the applicant and reliable guarantees of financial help from third parties.[44] Concerns were also raised regarding regional variations in wages; an applicant could earn the minimum income in London but have less disposable income than an applicant living elsewhere.[45] Other criticisms focussed on the discriminatory impact of the rules on particular groups and their failure to give adequate consideration to children's interests.[46]

Rather than asking the MAC to provide a minimum income threshold, more appropriate questions could have been how to deliver fairness and prevent abuse of the system, or how to ensure that spouses did not have recourse to public funds.[47] As the MAC themselves acknowledged, family migration is not solely an economic issue: it encompasses wider legal, social and moral issues.[48] Such an arbitrary requirement suggests that the capacity to integrate is a monetary measurement. It imposes "a reverse means test that excludes the needy, as if people on low incomes have nothing to contribute to this country."[49] Keeping families separated, or requiring sponsors to work excessively to meet the minimum income threshold, does nothing to assist the sponsor's own inclusion,[50] at least in terms of the social aspects of integrating, such as maintaining relationships and promoting interaction with others. Such a narrow approach to integration ignores its cultural, social, political and structural dimensions. Encouraging integration should promote a sense of belonging and shared identity with the receiving nation, assimilating families into the UK, not placing onerous restrictions on their inclusion. [51]

[44] See JCWI, fn.22, page 26.
[45] See Motion of Regret, col 185, Baroness Smith, fn. 24.
[46] See Motion of Regret, col 186, Baroness Smith, fn. 24.
[47] See ILPA's response fn.23.
[48] Migration Advisory Committee, *Review of the Minimum Income for Sponsorship under the Family Migration Route*, November 2011, paras 1.7 and 5.7: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286548/Family_report_Final.pdf* [Accessed 6 November 2017].
[49] Motion of Regret, Col 187, per Baroness Lister of Burtesett; fn.24.
[50] See Helena Wray, fn. 6, p.235.
[51] For discussion of the different aspects of integration see Sarah Spencer and Katharine Charsley, 'Conceptualising integration: A framework for empirical research, taking marriage migration as a case study' (2016) 4 Comparative Migration Studies K. CMS (2016) 4: 18. https://comparativemigrationstudies.springeropen.com/articles/10.1186/s40878-016-0035-x [Accessed 6 February 2018].

The All-Party Parliamentary Group (APPG) on Migration reported on the impact of the rules a year after their implementation.[52] Recommendations were made to assess discriminatory effects of the provisions, consider the impact on the best interests of children, review permitted sources of funds and to make the rules more accessible. But the MIR was retained and the rules were not amended. These issues were central to the judgments in *MM and Others* as the case passed through the courts. The final outcome of the Supreme Court was awaited by thousands of applicants whose decisions were dependent on it.[53] The plight of the applicants in the case exemplifies the hardship caused by the MIR, and the permitted restrictions on family life.

The Case of *MM and Others*

The Appellants

The Supreme Court considered the appeals of five appellants with the right to live and work in the UK, but married to spouses without this right. All the applicants were disadvantaged by the minimum income requirement. The inability to rely on the current and potential earnings of the partner coming to the UK adversely affected both MM (whose wife had a BSc in nutrition and was employed in Lebanon as a pharmacist) and Shabana Javed (who had little chance of earning the required income level, but whose husband was a civil servant in Pakistan). Abdul Majid's chances of employment would have improved if his wife were to be permitted entry to assist with the childcare of their five children, four of whom were living in the UK. AF, MM's nephew, was an interested party on MM's claim. He lived with MM and his mother (MM's sister). He claimed that the rules adversely affected his rights under Article 8 of the European Convention on Human Rights (ECHR). He also claimed the rules breached the Secretary of State's duty to safeguard and promote children's

[52] All-Party Parliamentary Group on Migration, *Report of the Inquiry into New Family Migration Rules,* June 2013, para 6, page 35: *http://appgmigration.org.uk/wp-content/uploads/2012/11/APPG_family_migration_inquiry_report-Jun-2013.pdf* [Accessed 10 November 2017].

[53] See Chris Desira, "UPDATED: Home Office makes changes to Appendix FM Minimum Income Rule following MM case," 10th August 2017, Free Movement Blog, reporting around 5000 applications on hold as at 30th June 2017, awaiting the outcome of the Supreme Court decision: *https://www.freemovement.org.uk/home-office-makes-changes-appendix-fm-minimum-income-rule-following-mm-case* [Accessed 10 November 2017].

rights under section 55 Borders Citizenship and Immigration Act 2009 (BCIA). SS was from the Democratic Republic of Congo (DRC) and married to a refugee from the DRC, whose income was below the threshold but well above the minimum wage. SS had recently suffered a miscarriage and needed to be with her husband in the UK. The MIR restricted all these cross-border relationships and inhibited integration by denying family reunion.

The High Court Decision

The appellants in *MM and Others* will have found temporary solace in the decision of Blake J in the High Court.[54] He found that the rules could lead to a disproportionate interference with Article 8 ECHR, as five of their specific features were particularly onerous when two or more were combined. These features were (i) that the income threshold of £18,600 was three times higher than the previous requirement, greater than average salaries for a number of UK occupations and more than the full-time national minimum wage; (ii) the requirement of £16,000 in savings on top of the shortfall calculation; (iii) the lengthy increase in the probationary period of leave; (iv) the exclusion of credible and reliable third party support, and (v) the exclusion of potential earnings of the partner entering the UK. The court suggested 'less intrusive responses' could include reducing the minimum income to £13,500, permitting savings over £1,000 to be used, considering potential earnings of the spouse after entry, permitting credible third party support and reducing the period of projected income to 12 months rather than 30.[55] These onerous features affected the decision of the Supreme Court but it is pertinent to consider first the findings of the Court of Appeal, approaching the case from a more restrictive and pragmatic stance.

The Court of Appeal Decision

The Court of Appeal overturned the High Court decision, finding that a challenge to an immigration rule in principle, rather than an individual decision made under Article

[54] *MM and Others* (High Court) fn.4.
[55] *MM and Others* (High Court) [147] (Blake J).

8, required the rule itself to be inherently disproportionate or unfair. Only if the income requirement was incapable of being proportionate in any case would it be inherently unjustified and unlawful.[56] This was far removed from the finding of Blake J and showed significant deference to the Secretary of State's position, despite all the criticisms levelled at the rules.[57] The Court of Appeal did not pass judgement on the relative merits of each of the features identified by Blake J as onerous, deferring to the views of the Secretary of State in these policy matters. Aikens LJ advocated that "appropriate weight" had to be given to the view of the Secretary of State on the maintenance level, and referred to the independent research of the MAC and the wide consultations on the rules, failing to mention the conclusions of the latter.[58]

The court could not impose its own view of an appropriate MIR unless the levels chosen were irrational, inherently unjust or fundamentally unfair. Despite substantial criticisms of the injustice resulting from the rules,[59] the unfairness of their discriminatory impact[60] and the irrationality of the chosen sources of income,[61] it was found that the rules did not meet these tests.[62] The MIR was endorsed and found to be capable of compatibility with Article 8 rights. The exclusion of third party support was deemed to be rational and measured.[63] The disproportionate impact of the MIR on certain groups was justified on the grounds that "all immigration law is inherently discriminatory."[64] Individual challenges, considering Article 8 matters outside the rules, were still permissible in exceptional circumstances.[65]

The Court of Appeal found the duty to consider children's best interests, under section 55 of the Borders, Citizenship and Immigration Act 2009 Act (BCIA 2009), to be discharged in the rules. A general reference to these interests within the rules was deemed as sufficient.[66] Emphasis was placed on the reasonableness of requiring adequate financial provision for children, and this was aligned to their best

[56] *MM and Others* (Court of Appeal) [132] (Aikens LJ).
[57] See further G. Manning, "MM and others: the endorsement of discrimination" (2015) S.L. Rev. Vol 74 (Spr) 30-34.
[58] See *MM and Others* (Court of Appeal) [148] (Aitkens LJ).
[59] See ILPA, fn. 23.
[60] See JCWI, fn 22*;* Motion of Regret, cols 179-200, fn.24.
[61] For example, the omission of potential earnings of the spouse and reliable guarantees of third party support. Examples of case studies were given by JCWI, fn.22, and the APPG, fn. 65.
[62] *MM and Others* (Court of Appeal) [150] (Aitkens LJ).
[63] *MM and Others* (Court of Appeal) [144, 153] (Aitkens LJ) .
[64] *MM and Others* (Court of Appeal) [155] (Aitkens LJ).
[65] *MM and Others* (Court of Appeal) [159-160] (Aitkens LJ) .
[66] Gen 1.1 Appendix FM.

interests. A finding that the financial requirements were lawful must mean that the section 55 duty had been discharged in framing the relevant immigration rule.[67] This simplistic formulation of best interests was a matter considered by the Supreme Court, and a compromise found between the generous findings of Justice Blake in the High Court and the Court of Appeal's deference to the Secretary of State.

The Supreme Court Decision

The Supreme Court was asked to consider the legality of the minimum income requirement, rather than its application to individual cases.[68] Article 8 matters were considered at length alongside issues relating to proportionality.[69] The main areas under consideration were narrowed to the acceptability in principle of the MIR as human rights compliant, consideration of children's interests and the treatment of alternative sources of funding.[70]

Human Rights Compliance

In considering the compatibility of the rules with Article 8, the appellants' cases were compared to *Quila,*[71] where the introduction of an age limit of 21 for partners was found to be disproportionate. The number of unforced marriages prevented by the rule greatly exceeded the amount of forced marriages it purported to deter.[72] The MIR rule, by contrast, had a clear immigration dimension, its overall strategy being to reduce net migration.[73] The Supreme Court in *MM and Others* reinforced the possibility of a rule being unlawful in individual cases, yet still Article 8 compliant overall. The court followed the reasoning in *Bibi,*[74] where the controversial pre-entry language requirement and test were found to be lawful and Article 8 compliant. Unless the rule itself was incapable of being proportionately applied in the vast majority of cases, it would remain lawful. The Court found the need for a two-stage test; assessing amenability with the rules was only the first part of the decision-

[67] *MM and Others* (Court of Appeal) [162] (Aitkens LJ) .
[68] *MM and Others (*Supreme Court) [52] (Lady Hale and Lord Carnwath).
[69] *MM and Others (*Supreme Court) [41] (Lady Hale and Lord Carnwath).
[70] *MM and Others* (Supreme Court) [80-101] (Lady Hale and Lord Carnwath).
[71] *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45.
[72] See fn.71 [58] (Lord Wilson).
[73] *MM and Others* (Supreme Court) [82] (Lady Hale and Lord Carnwath).
[74] *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68.

making process. Where appellants did not meet the rules, Article 8 compliance involved a separate proportionality assessment, balancing individual and public interests.[75]

The Secretary of State's altered perspective at the hearing enabled consideration of Article 8 matters outside the rules, after first assessing compliance with the rules themselves. The Supreme Court in *MM and Others* commented on the difficulties for the appellants to ascertain the position of the Secretary of State, given her original intention to shift the role of the courts from reviewing the proportionality of individual decision-making to reviewing the proportionality of the Rules themselves. They contrasted her view that Parliament could prescribe the proportionate response in Article 8 matters at a general level, not needing redetermination in every case,[76] with the view of previous Secretaries of State that determining proportionality was a matter for the courts.[77]The Supreme Court emphasised the importance of making decisions on individual facts, in accordance with the House of Lords decision in *Huang*.[78] Although a general, clear Home Office policy promoted consistency, attempting to fit article 8 considerations into a rigid template within the rules was misconceived. It excluded consideration of special cases outside the rules and negated the evaluative nature of the proportionality assessment under article 8 of the Convention. [79] The Secretary of State could outline her policy guidance on matters concerning the public interest to assist, but not dictate, the judicial conclusions made.

By fundamentally changing her position the Secretary of State was viewed as the victorious party in the case; the MIR was upheld in principle, but with important concessions on how it was applied. Adhering to her original intentions may, by contrast, have forced a finding that the rules were unlawful. Given the concessions made, the Supreme Court could find that the rules were only a starting point for the Article 8 assessment. The Secretary of State did maintain her position that the rules

[75] See *MM and Others* (Supreme Court) [60-61] (Lady Hale and Lord Carnwath).

[76] *Immigration Rules on Family and Private Life (HC 194): Ground of Compatibility with Article 8 of the European Convention on Human Rights,* Statement by the Home Office, para 22: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/286879/echr-fam-mig.pdf* [Accessed 14 November 2017]. Quoted in *MM and others* (Supreme Court) [12] (Lady Hale and Lord Carnwath).

[77] *MM and Others* (Supreme Court) [63] (Lady Hale and Lord Carnwath).

[78] *Huang and Kashmiri v Secretary of State for the Home Department* [2007] UKHL 11.

[79] *MM and Others* (Supreme Court) [64-66] (Lady Hale and Lord Carnwath).

were convention compliant in most cases. However, she conceded that in "exceptional circumstances," *now* defined as "circumstances where a refusal would lead to "unjustifiably harsh" consequences for the individual or their family,"[80] Article 8 would be considered outside the rules. Exceptional circumstances no longer required something "truly exceptional,"[81] as anticipated at the inception of the rules, but would be interpreted in this alternative way.[82]

It was accepted that the MIR prevents the unification of thousands of couples, permanently impeding family life for many. The Supreme Court also acknowledged that the MIR disproportionately affected female sponsors and those from certain ethnic groups, less likely to be earning the required amount.[83] However, Article 8 compliance was upheld. The policy was justified as part of an overall strategy to reduce net migration, with the legitimate aim of ensuring couples do not have recourse to public funds and are "able to play a full part in British life."[84]

Alternative Sources of Funding

A positive outcome of the Supreme Court was the finding regarding alternative sources of funding. Where the Court of Appeal had not found the endorsement of third party support in *Mahad*[85] as pertinent,[86] the Supreme Court decision permitted alternative sources of income to be considered in certain cases. Rather than using the MAC's report to justify the MIR in principle, their consideration of different sources of income was recognised. Whilst support from third parties may be difficult to verify, other income streams could be accounted for if it was operationally feasible.[87]

As they stood, the rules only permitted third party support for accommodation or in cash savings held for six months or more. However, the MAC had found a "strong case" for taking potential earnings of the applicant into account despite the

[80] *MM and Others* (Supreme Court) [68] (Lady Hale and Lord Carnwath) .
[81] This was the intention of the Secretary of State in the debate approving the rules: Hansard HC, 19 Jun 2012: Cols 762-763. See discussion by Steve Symonds, in *Family Migration,* (2012) 26 IANL 220-222, 220-221.
[82] *MM and Others* (Supreme Court) [67 -68] (Lady Hale and Lord Carnwath) .
[83] *MM and Others* (Supreme Court) [80-81] (Lady Hale and Lord Carnwath).
[84] *MM and Others* (Supreme Court) [82] (Lady Hale and Lord Carnwath).
[85] *Ahmed Mahad (previously referred to as AM) (Ethiopia) and others v Entry Clearance Officer* [2009] UKSC 16.
[86] *MM and Others* (Court of Appeal) [144, 153] (Aitkens LJ).
[87] MAC report paras 4.15- 4.19, fn. 48, quoted in *MM and Others* [94] (Lady Hale and Lord Carnwath).

"substantial risks and uncertainties" in calculating these earnings.[88] Although conceding that the rules were lawful in themselves, the court found that the Article 8 assessment necessitated a broader approach to alternative sources of funding. The Secretary of State could indicate criteria against which the reliability of such sources would be judged, but was not permitted to exclude them in their entirety.[89] Whilst concluding that the rules themselves could not be challenged, aspects of the instructions needed revising to ensure human rights compliance. However, it was suggested that the Secretary of State may consider revising the rules themselves to deal with this more efficiently and to indicate when such sources could be used.[90]

Best Interests of Children

A firmer stance was taken by the Supreme Court regarding the effect of the provisions on children, finding the rules deficient in their compliance with the s55 duty.[91] The coverage of children's interests in Appendix FM was found to be inadequate.[92] The Immigration Directorate Instructions failed to remedy this deficiency, specifying prescriptive factors as relevant, only alleviated by the applicant's presence in the UK. Particular examples given were support during a medical procedure or preventing abandonment where no other family member in the UK could care for the child.[93] This restrictive test was found neither to treat the best interests of the child as a primary consideration,[94] nor to meet the s 55 requirements regarding children's welfare. The guidance was found to be defective and require amendment, alongside the rules. These limitations on consideration of best interests were "highly prescriptive" and the statement in Gen 1.1 of the rules that the duty had been taken into account was wrong in law.[95]

[88] MAC report paras 4.10-4.22, fn.48.
[89] *MM and Others* (Supreme Court [100] (Lady Hale and Lord Carnwath).
[90] *MM and Others* (Supreme Court [101] (Lady Hale and Lord Carnwath).
[91] Section 55 Borders Citizenship and Immigration Act 2009.
[92] *MM and Others* (Supreme Court) [90] (Lady Hale and Lord Carnwath).
[93] The former versions of the guidance were before the Supreme Court: *Immigration Directorate Instruction: Family Migration: Appendix FM Section 1.0a: Family Life (as a Partner or Parent); 5-year Routes and Immigration Directorate Instruction: Appendix FM Section 1.0b: Family Life (as a Partner or Parent) 10-Year Routes*, August 2015 (the former has now been updated): See *MM and others* [2017] UKSC 10 [24, 91] (Lady Hale and Lord Carnwath).
[94] As required by *Jeunesse v The Netherlands* (2015) 60 EHRR 789 [119] quoted in *MM and others* [2017] UKSC 10 [89]. See also *ZH Tanzania v Secretary of State for the Home Department* [2011] UKSC 4; *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74.
[95] *MM and Others* (Supreme Court) [92] (Lady Hale and Lord Carnwath).

Assessing the Decision in *MM and Others*

In assessing the decision in *MM and Others*, four major points will be addressed. Firstly, the constitutional role of the courts will be considered and the need to defer to the Secretary of State's view on the public interest, whilst maintaining individual Article 8 rights. Secondly, how the Supreme Court dealt with the acceptability of the MIR will be addressed. Thirdly the findings relating to alternative sources of funding will be discussed. Finally, the best interests of children will be considered in line with the section 55 duty under BCIA 2009.

The Constitutional Role of the Courts

On the introduction of the rules, the then Home Secretary declared that subsequently there would, in general, "be no need for a separate assessment of article 8 beyond the requirements set out in the immigration rules…other than in truly exceptional circumstances."[96] The introduction to Appendix FM GEN 1.1 of the rules states that the rules reflect "how, under Article 8 of the Human Rights Convention, the balance *will* be struck between the right to respect for private and family life and the legitimate aims of protecting national security, public safety and the economic well-being of the UK" (*emphasis added*). Such statements convey obvious attempts to influence judicial decisions by one party to the proceedings. By contrast, a separate Article 8 assessment ensures an independent judicial check on the increasing use of the immigration rules to influence decision-making.

The Secretary of State purported to steer judicial decision making in this area, her statement of intent indicating that the courts' role would shift from reviewing the proportionality of individual administrative decisions to reviewing the proportionality of the rules.[97] Parliament's view was to be the starting point of the assessment and, whilst subject to review by the courts, should be accorded "the deference due to a democratic legislature."[98] But immigration rules are not primary legislation, rather statements of administrative policy, indicating how the Secretary of State will

[96] Hansard HC, 19 Jun 2012: Cols 762-763. See: Steve Symonds, "Family Migration", (2012) 26 IANL 220-222, 220-221.
[97] Statement of Intent, fn 25, para 39.
[98] Statement of Intent, fn 25, para 40.

exercise her executive discretion to grant leave to enter or remain at a given time.[99] They enter into force through the negative resolution procedure[100] and do not require approval by both Houses of Parliament. If they are debated in Parliament and disapproved they are simply amended to attract approval rather than abrogated.[101] To expect strict adherence to these rules, in cases involving potential human rights breaches, undermines an important judicial check on the wide discretionary powers of the Secretary of State.

The Supreme Court was faced with a choice between accepting that the immigration rules could determine the proportionality issue in most cases, or deciding for themselves where the balance lies.[102] Instead they chose a middle ground between the two; the rules can be applied in many cases, but a second stage to the process enables the courts to consider Article 8 matters separately (the 'two-stage test'). To deny this second stage would limit the flexibility and discretion needed in decision making, given the diverse and complex situations covered by Article 8 and the significant implications of erroneous decisions on family life.[103] As noted by Lord Bingham in *EB Kosovo*, there is no 'hard-edged or bright-line rule to be applied to the generality of cases' as this 'is incompatible with the difficult evaluative exercise which article 8 requires.'[104] As Thomas warns:

> "The risks are obvious: hard line rules are blunt instruments which seek to reflect the proportionality assessment under art. 8, but may in some cases leave the rules in breach of it."[105]

The Supreme Court considered the importance of tribunal experience in decision-making. Tribunal decisions influence the executive and this should create "a partnership between two agencies each charged by the legislature with a specific role in administering a system which is to be fair both to the public and to individual

[99] *Odelola* [2009] UKHL 25 [35] [Lord Brown].
[100] This procedure involves the rules being laid before Parliament and a period of 40 days being given for them to be disapproved. After this period they are passed as rules. See further section 16 Legislative and Regulatory Reform Act 2006.
[101] *Odelola* [2009] UKHL 25 [35] [Lord Brown].
[102] R. Thomas, "The New Immigration Rules and the Right to Family Life'" UK Const. L. Blog (4th October 2012): http://ukconstitutionallaw.org) [Accessed 17 May 2018].
[103] R. Thomas, "Agency rulemaking, rule type, and immigration administration" (2013) P.L. 135, 145.
[104] *EB (Kosovo) v Secretary of State for the Home Department* UKHL 41 at [12] (Lord Bingham).
[105] R. Thomas, "Agency rulemaking, rule type, and immigration administration" (2013) P.L. 135, 147-148.

applicants."[106] The courts continue to be "acutely conscious of their constitutional role" and the need to avoid judicial legalism whilst maintaining a check on the powers of the executive.[107] The Supreme Court commented on the need for tribunals to attach considerable weight to policy judgements made by the Secretary of State in exercising her constitutional responsibility to control immigration.[108] The changed view of the Secretary of State at the hearing, conceding that that the proportionality exercise was a matter for the courts, enabled a finding that the MIR itself was lawful, provided certain amendments were made to the rules and guidance.

The Acceptability of the MIR: Reducing Migration and Promoting Integration?

In setting national policy, the availability of evidence and expertise to inform decision-making is important. In *Quila* there was scant evidence to show raising the minimum age requirement from 18 to 21 would prevent forced marriages. By contrast, the evidence upon which the MIR was set was much clearer, given the report of the MAC.[109] The Supreme Court found that determining the income level required was within the remit of the Secretary of State. However, assessing the quality of evidence needed to meet the threshold was a matter for the Tribunal, given its expertise.[110] The assessment of the quality of the MAC's evidence did not, however, address the limitations and restrictions of the report, as acknowledged by the MAC itself. The MAC had highlighted the assumption, in the figures provided, that the spouse or partner's income be omitted and had offered to explore a more inclusive approach.[111]

Deference to the Secretary of State's position on the need for an MIR ignores the significant evidence that it was unnecessary.[112] There had been a failure of the Home Office to provide evidence that public funds were being used under the former maintenance requirements[113] and the MAC themselves noted the restrictive remit of

[106] *MM and Others* (Supreme Court) [74] (Lady Hale and Lord Carnwath).
[107] Helena Wray "Greater than a Sum of their parts: UK Supreme Court decisions on family migration" (2013) PL 838, 844. Dr. Wray discusses many significant Supreme Court decisions relating to family migration, including *Quila* and *Huang*, exemplifying potentially wide powers being exercised with restraint.
[108] *MM and Others* (Supreme Court) [75] (Lady Hale and Lord Carnwath).
[109] *MM and Others* (Supreme Court) [76] (Lady Hale and Lord Carnwath).
[110] *MM and Others* (Supreme Court) [75-76] (Lady Hale and Lord Carnwath).
[111] See MAC Report, paras 1.7 and 5.8, fn.48.
[112] See ILPA, fn. 23, JCWI, fn. 22.
[113] See ILPA fn. 23.

their report and the failure of the Secretary of State to pose the question as to the need for a MIR in principle.[114] The MIR policy overlooks prerequisites to integration, such as the preservation of stable and united families, the maintenance of multicultural relationships and the promotion of social and cultural diversity. Any discussion of citizenship rights is omitted from the Supreme Court judgment, despite the MIR leading to long term exclusion of citizens and families without sufficient earning capacity to ever attain the required level.[115]

Suggesting that the income support level cannot promote integration indicates that benefits for British citizens are not set at the appropriate amount.[116] It is difficult to reconcile claims that significantly more money than the income support level, or indeed the national minimum wage, is needed to integrate. What constitutes "a full part in British life"[117] is left undefined in the judgment and could suggest bias in its definition. Not all activities contributing to a fulfilling and active life can be given monetary value, and again the predominance of economic values over social and moral issues is transparent in the reasoning of the court. Such a narrow policy focus restricts citizens' autonomous choices about where to live and work, a significant deficiency in a purportedly liberal society.[118] To promote diversity and tolerance, it is imperative that government policies do not restrict integration to a purely economic concept, but recognise it as a more complex phenomenon. A narrow monetary approach to integration – in fact one reduced to the sole factor of income – is at odds with the spirit of cultural pluralism and diversity that has been the stated policy focus of recent governments.[119]

The global aspects of integration of cross-border couples were not explored by the court and the linear economic question prevailed, ostensibly with the reduction of net

[114] Discussed in: Motion of Regret, col 181, Baroness Smith, fn.24; MAC Report, para 1.7, fn.48.
[115] Professor Christopher Bertram, Dr. Devyani Prabhat and Dr. Helena Wray, "The UK's spousal and family visa regime: some reflections after the Supreme Court judgment in the MM case" (*Bristol Scholars,* 8 March 2017) *http://legalresearch.blogs.bris.ac.uk/2017/03/the-uks-spousal-and-family-visa-regime-some-reflections-after-the-supreme-court-judgment-in-the-mm-case/#comments* [Accessed 11th May 2018].
[116] See ILPA response to the Consultation, fn. 23, p.12.
[117] The phrase used in justifying for the MIR: See *MM and Others* (Supreme Court) [82] (Lady Hale and Lord Carnwath).
[118] See Bertram, Prebhat and Wray, fn. 115. .
[119] See Home Office, *Statement from the new Prime Minister Theresa May,* 13th July 2016: *https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may* [Accessed 30 November 2017]; Home Office, *Nick Clegg's speech at the UN General Assembly 2013*: *https://www.gov.uk/government/speeches/nick-cleggs-speech-at-the-united-nations-general-assembly-2013* [Accessed 30 November 2017].

migration being the prevalent focus. The further and ancillary aim of reducing the burden on the taxpayer is difficult to reconcile with a single income policy. The combined income of couples, especially where the high net worth individual enters the UK, is in fact more likely to reduce the family's dependence on state benefits. This is particularly the case where dependent children are involved.[120] Single people, with or without dependent children, are more likely to claim housing benefit than couples, with combined resources inevitably greater than one income.[121] Furthermore, a single income at one moment in time does not portray an accurate picture of the enduring access to public funds.[122] It is suggested that encouraging integration of couples could promote long-term reductions in welfare benefit access, unachievable with the rules in their current format. This calls into question the stated intentions of the rules at their inception.

The Best Interests of Children

The finding of the inadequate coverage of children's best interests in the rules and guidance was perhaps the most far-reaching aspect of the decision. The Supreme Court found that the old rules were highly prescriptive in their format at the time of the hearing, and failed to account for the section 55 duty regarding children's best interests, or to consider the factors laid down by the Grand Chamber in *Jeunesse.*[123] The Grand Chamber in J*eunesse* found that, in any decisions concerning children, the need to have regard to their best interests, although not decisive, was of 'paramount importance' and needed to be accorded 'significant weight'.[124] Such interests are particularly important in entry clearance cases where, unlike in removal and deportation cases, there is not usually a breach of immigration controls involved nor any criminality to counterbalance the right to respect for family life.

[120] The Quarterly Statistics for the Department of Work and Pensions reported that at February 2017, the total number of Income Support claimants was 610 thousand and lone Parents (all single claimants with dependants under 16, excluding claimants of incapacity benefits) represented 64% of the income support caseload. *Department of Work and Pensions Quarterly Benefits Summary, February 2017*: *https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/637845/dwp-quarterly-benefit-stats-summary-august-2017.pdf* [Accessed 6 November 2017].

[121] The Department of Work and Pensions Statistics show, for example, how in May 2017, 1,187,501 single males (54,117 with child dependents) and 2,312,777 single females (1,022,030 with child dependents) received housing benefits as opposed to 947,464 couples (522,142 with child dependents). *Stat Explore: Housing Benefit Claimants*: *https://stat-xplore.dwp.gov.uk/webapi/jsf/tableView/tableView.xhtml* [Accessed 6 November 2017].

[122] See Helena Wray, fn 6, p.237.

[123] *Jeunesse v The Netherlands* (2015) 60 EHRR 789.

[124] *Jeunesse*, fn. 123, [109] quoted in *MM and others* (Supreme Court) [41] (Lady Hale and Lord Carnwath).

The effect of an absent parent on the child's best interests is hard to measure. The more comprehensive approach suggested by the Supreme Court is welcome, but does not align with Home Office policy objectives[125] and therefore may face reluctance in its implementation. It is difficult to see how the separation of a child and parent, for monetary reasons alone, can ever be in the child's best interests. However the MIR has led to thousands of children living apart from parents, with many suffering from separation anxiety and behavioural problems, compounded by the stress on the family unit.[126] Rather than promoting integration, this policy has enforced segregation of families, causing significant tension and distress. This is exemplified in the recent report of a man separated from his Ecuadorian wife and British citizen children, whilst his wife was still breastfeeding their third child. The fairness of the MIR, even with the important concessions made by the Supreme Court, thus remains contentious.[127] Whether the amended rules and guidance have accurately implemented the decision in *MM and Others* will now be examined.

The Amended Rules and Guidance

Children's Best Interests

The amended rules and guidance give effect to the decision regarding children's best interests. The immigration rules now make express provision for these interests. Gen 3.3 Appendix FM states that:

> "In considering an application for entry clearance or leave to enter or remain where paragraph GEN.3.1. or GEN.3.2. applies, the decision-maker must take into account, as a primary consideration, the best interests of any relevant child."

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125 See Bertram, Prebhat and Wray, fn.115.

126 Children's Commissioner, *Family Friendly? The impact on children of the Family Migration Rules: A review of the financial requirements,* August 2015: *https://ore.exeter.ac.uk/repository/bitstream/handle/10871/26518/Published%20report.pdf?sequence=1&isAllowed=y* [Accessed 30 November 2017}. At this time, 15,000 children were reported to be separated from their parents due to the MIR.

127 Colin Yeo, "Why is the Home Office separating a British man from his wife when she is still breastfeeding their daughter'" 16th October 2017, Free Movement Blog: *https://www.freemovement.org.uk/home-office-separating-british-man-wife-still-breastfeeding-daughter/* [Accessed 17 November 2017].

Gen 3.1 and 3.2 deal with the situation where the financial requirement itself is not met, but there are "exceptional circumstances" leading to "unjustifiably harsh consequences for the applicant, their partner a relevant child or another family member" on refusal of the application.[128] Such circumstances permit consideration of other sources of income or funding as set out in s21 A (2) Appendix FM SE.[129]

The underlying issue of how an onerous maintenance requirement subordinates children's interests has not been addressed. Sponsors may be forced to work excessively to meet the requirement and families are segregated where the maintenance level is not met. As commentators have argued:

> "Children who are forcibly separated from a parent do not grow up in circumstances that are best for their personal development and a state that brings about such a separation inflicts real harm on its own citizens."[130]

Unless the separation of a child from a parent can, of itself, amount to unjustifiably harsh consequences, the impact of the rule changes is likely to be minimal. The MIR will continue to promote segregation rather than integration and the concerns regarding children's welfare and personal development are likely to persist.

Likewise, an additional amendment has been made to paragraph EX 1, exceptional circumstances where leave to remain will be granted without meeting the minimum income requirement. This amendment accounts for the best interests of the child as a primary consideration when determining whether it would be unreasonable for the child to leave the UK. [131] However, this does not affect the need for a child to be either a British citizen or have lived in the UK continuously for at least 7 years immediately preceding the date of the application.[132] A child may have lived all, or a significant part, of their life in the UK but not be a British citizen nor have reached the seven-year threshold. Further reaching amendments could have dealt with the best interests of children more appropriately.

[128] Gen 3.2 (2) Appendix FM. The family member's Article 8 rights must be affected by the decision.
[129] Gen 3.1 Appendix FM.
[130] See Betram, Prebhat and Wray, fn. 115.
[131] Appendix FM para EX 1 (a) (ii).
[132] Appendix FM para EX 1 (a) (i) (cc).

The amended Home Office guidance is more detailed, outlining a wide range of factors to be accounted for in making the assessment. The best interests of the child are purported to be a "primary consideration," with the guidance and the rules seen as ensuring the practical effect of the s55 duty.[133] The principle is propounded that a child should not be blamed for the failure of one or both of their parents to comply with immigration controls. A broad reference is made "to the overall well-being of the child" being a "distinct consideration."[134] This precedes a detailed checklist of relevant factors in the assessment of best interests. However, the emotional and psychological effect of separation from a parent is not addressed specifically. The criteria relate more to financial provision, schooling, age, nationality, education, generic health and logistical matters. Additional factors for children present in the UK do consider the child's well-being, but equate this to the necessity of the parent being in the UK either where no other family member is able to care for the child here, or where support is needed during a major medical procedure.[135] These exceptions are similar to the stringent test heavily criticised by the Supreme Court in *MM and Others,*[136] demonstrating a reluctance to implement the judgment as radically as was intended.

The comprehensive criteria conclude with a reference to the need for "substantive and compelling factors"[137] to enable entry clearance where the rules are not met. Arguably the separation of a child from a parent should satisfy this test. Instead the detailed requirements permit considerable subjectivity in initial decision-making and risk being used as a checklist rather than part of the holistic process anticipated.[138] Given the findings of the Supreme Court in *MM* that the old rules were highly prescriptive in their format at the time of the hearing, and failed to account for the section 55 duty to have regard to children's best interests as a primary consideration, it is questionable whether the new rules will remedy this deficiency.[139]

[133] See Immigration Directorate Instructions, paras 1.2 and 13.6, fn. 9.
[134] See fn.9. paras 1.2 and 13.6.
[135] See fn.9 para 13.6.
[136] *MM and Others* (Supreme Court) [91-92] (Lady Hale and Lord Carnwath).
[137] Para 13.6.
[138] See Immigration Directorate Instructions, fn.9. Para 13.6 states: "The assessment of a child's best interests requires a holistic consideration of all relevant factors in the particular case" and that the list is a "non-exhaustive list of factors which are likely to be relevant."
[139] *MM and Others* (Supreme Court) [91].

The best interests of children are considered mainly in the amended guidance rather than the rules, despite the Supreme Court's declaration that the s55 duty 'stands on its own feet as a statutory requirement'[140] and, while detail can be given in the guidance, 'it should be clear from the rules themselves that the statutory duty has been properly taken into account'.[141] It is questionable whether the new rules have this intended impact and really promote children's best interests, when cohabitation with both parents could be seen as the best way to promote integration and stability.

Additional Sources of Funding

Within the amended rules, specific provision is made for the use of additional sources of funding. Where the financial requirement applies, and is not met by the specified sources in the rules, other sources of income, financial support or funds must be considered by the decision-maker.[142] However, these are also only permitted in the same "exceptional circumstances," resulting in "unjustifiably harsh consequences for the applicant, their partner or a relevant child."[143] In these circumstances, leave will be granted under the ten-year route to settlement, rather than the five-year route.[144] This further obstacle was not envisaged by the Supreme Court in *MM and Others* and is a possible ground for future challenge.[145]

The amendments to Appendix FM-SE of the rules specify the other sources of income or financial support accounted for in the ambivalent "exceptional circumstances" in which they will apply. Further indeterminate guidance is given as to the sources permitted, requiring subjective assessments of the credibility of sustainable third party support, prospective earnings or self-employment.[146] Asking the Home Office to determine the concept of credibility carries its own risks[147] and may lead to inconsistent and unreliable decisions. Furthermore, these assessments

[140] *MM and Others (*Supreme Court) [92] Lady Hale and Lord Carnwath).
[141] *MM and Others* (Supreme Court) [92] Lady Hale and Lord Carnwath).
[142] Para 21A Appendix FM SE.
[143] Gen 3.1 (1) (b) Appendix FM as amended, August 2017.
[144] D-ECP. 1.2 -LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2. Appendix FM.
[145] See Desira, fn.53.
[146] Appendix FM-SE para 21A (2) (a) – (c).
[147] See for example: Jessica Anderson, Annelisa Lindsay and Colin Williamson, "The culture of disbelief: An ethnographic approach to understanding an under-theorised concept in the UK asylum system" Refugee Studies Centre, University of Oxford, Working paper series no. 102: *http://www.rsc.ox.ac.uk/files/publications/working-paper-series/wp102-culture-of-disbelief-2014.pdf* [Accessed 27 November 2017]; James Souter, "A Culture of Disbelief or Denial? Critiquing Refugee Status Determination in the United Kingdom," Oxford Monitor of Forced Migration Volume 1, Number 1, 2011, 48-59. Although dealing mainly with asylum matters these studies point to a general refusal culture within the Home Office.

will only take place when the "exceptional circumstances" and "unjustifiably harsh consequences" hurdles have been overcome. It is perhaps unsurprising that some have referred to the section as "rather painful reading" and that "some parts might as well be written in hieroglyphs."[148]

Alongside the ambiguous terminology used, a genuineness test[149] adds another layer to the decision-making process. The applicant must find "verifiable documentary evidence" to show that the funds provided are genuine, credible and reliable. With obligations such as providing sufficient evidence of the third party's general financial situation, demonstrating the extent to which the third party will contribute to the income and obtaining independent verification of the source, the test becomes progressively more stringent and the support increasingly likely to be rejected. Similar factors are enumerated to show potential earnings.[150] Such requirements are in line with the complex and detailed nature of Appendix FM-SE generally. The true implications of the Supreme Court's decision, and whether the compromises suggested by the court will impact positively, remain to be seen. How Home Office caseworkers apply the prescriptive provisions of Appendix FM, Appendix FM SE and the accompanying guidance will be critical. If a caseworker is legitimately confused by the multiple tests and complex criteria provided, the number of applicants benefitting from the rules may be minimal. Concerns regarding integration of families will therefore remain and couples on lesser incomes will continue to be segregated by the MIR, whatever their circumstances.

"Exceptional Circumstances" and "Unjustifiably Harsh Consequences"

To leave the determination of what amounts to "exceptional circumstances" and "unjustifiably harsh consequences" in the hands of Home Office caseworkers is optimistic, given ongoing criticisms of initial decision-making and the "significant and pervasive concerns about the quality of the decisions produced."[151] It is easy for caseworkers to make an incorrect decision if they do not collect all the relevant information or inadequately assess the evidence provided. Furthermore, relevant

[148] UK Immigration Watch Blog, "How to meet the minimum income requirement through a restructured Appendix FM," 5 September 2017: *https://ukimmigrationjusticewatch.com/2017/09/05/how-to-meet-the-minimum-income-financial-requirement-through-a-re-structured-appendix-fm/* [Accessed 17 November 2017].
[149] Appendix FM-SE para 21A para 8 (a).
[150] Appendix FM-SE para 21A para 8 (b).
[151] Robert Thomas, "Administrative justice, better decisions, and organisational learning" (2015) PL 111, 111.

rules, guidance, policy or procedures may be misinterpreted or applied incorrectly, whilst inadequate reasons might be given for decisions.[152] This problem is exacerbated by the detail present in the updated guidance to Appendix FM and Appendix FM SE, already complex and prescriptive documents in themselves.

The phrase "exceptional circumstances" does not imply its literal meaning of exceptionality, but is simply defined as circumstances resulting in "unjustifiably harsh consequences."[153] Both concepts imply much more than a disproportionate response. Even if a caseworker does digest the detailed guidance in full before deciding a case, they may still be left confused by the circular and uncertain nature of the terms used.

The Home Office guidance on Appendix FM defines "unjustifiably harsh consequences" in the following way:

> "Unjustifiably harsh consequences" are ones which involve a harsh outcome(s) for the applicant or their family which is not justified by the public interest, including in maintaining effective immigration controls, preventing burdens on the taxpayer, promoting integration and protecting the public and the rights and freedoms of others….This involves consideration of whether refusal would be proportionate, taking into account all the facts of the case and, as a primary consideration, the best interests of any relevant child…"[154]

This definition does little to promote certainty in decision-making, leaving the decision-maker to interpret broad concepts such as "preventing tax burdens," "promoting integration" and "protecting the rights and freedoms of others." Proportionality is central to the decision-making, as confirmed in *Agyarko,*[155] quoted in the guidance.[156] Further considerations relate to whether the family unit can relocate overseas, the reasonableness of separation and whether family life was established in precarious circumstances.[157] Numerous other factors are detailed including the best interests of any children involved, the nature and extent of family

[152] See fn.151, p. 114.
[153] See Immigration Directorate Instructions, para 13.4, fn.9.
[154] Para 13.3.
[155] *Agyarko & Ikuga v SSHD* [2017] UKSC 11 [60] (Lord Reed).
[156] See fn.9 para 13.1.
[157] See fn9 paras 13.3 and 13.4.

relationships, public interest factors, cultural barriers to relocation overseas, mental illness, effect on health and well-being and the security situation in the country overseas.[158]

Leaving initial decision-makers to assess proportionality is ambitious. This is a task better assigned to experienced and legally qualified judges. Grasping that the test is commensurate with proportionality is difficult enough. Attempting to subsequently consider the infinite factors enumerated is likely to produce a range of subjective and conflicting results. However, not every decision is appealed and much simpler, clearer Home Office guidance could facilitate the initial decision-making process. This could encourage, rather than hinder, the integration of cross-border couples into UK society by promoting family reunion.

Concluding Remarks

While the Supreme Court judgment in *MM and Others* may be seen as a victory for the government, (upholding the minimum income in principle) the decision could also be viewed as a partial success for the claimants, in permitting a wider range of permitted sources of funds able to meet minimum income threshold, albeit in exceptional circumstances.[159] This has resulted in changes to the rules and significantly updated guidance on the current position. It may be that the Secretary of State's guidance restricts the expected impact of the decision in *MM and Others*, and that the concept of "unjustifiably harsh consequences" confuses decision-makers, but the full range of proportionality considerations can now be considered outside the rules. This is a fundamental departure from the original intentions of the Secretary of State at the implementation of the rules and proportionality has now superseded any exceptionality test.

It is significant that the decision has produced a result not dissimilar to the original judgment of Blake J in the High Court. The ability to show a range of different sources of income could have a positive impact on facilitating family reunion. Although tempered by the subjective assessment of what are "credible and reliable sources" of income, this is not significantly different from many of the other tests

[158] See fn. 9 para 13.5.

[159] Daniel Newman (2017) "Divided families and the immigration rules: a partial victory for British citizens with foreign spouses" Journal of Social Welfare and Family Law, 39:3, 357-360.

found in the immigration rules, such as in the Points Based System governing employment and investment in the UK.[160] Although Blake J in the High Court identified five features which together made the rules a disproportionate breach of Article 8, two of these have been endorsed by the Supreme Court decision. Third party support and potential earnings of the applicant can now be permitted, albeit in exceptional circumstances. This reduces the impact of a third feature, namely the high threshold of the MIR itself. Although failing to reduce the savings burden or the lengthy period required for settlement, this is a helpful compromise, particularly when the lawfulness of the MIR itself was preserved. The provisions have the potential to impact positively on future cases, if applied in a reasonable and constructive manner, but this could be a lengthy process and further individual challenges to restrictive decisions will undoubtedly be necessary.

By introducing excessive technicalities and overly prescriptive detail into initial decision-making, it is unlikely that Home Office decisions will always be accurate. Unfortunately, applicants ineligible for legal aid may not be financially able to challenge negative decisions, further disadvantaging those on lesser incomes. Consequently, the segregation of couples may continue, leading to more single persons and lone parents, with the increased benefit reliance this is reported to have. Alongside the cost of further challenges to the rules, public spending is likely to increase rather than decrease, effectively defeating one of the intended purposes of the rules. Furthermore, the purported intention of the rules to promote integration is called into question by their complexity. The guidance further hinders family reunification and causes stress and anxiety amongst affected partners and children.[161]

The legality of the MIR has been upheld, but in reality the result is more complex. The Secretary of State's altered position at the hearing enabled deference to her view on the need for an MIR in principle. This finding was tempered, however, by the requirement to amend the rules in relation to alternative sources of funding and children's best interests. Regrettably, the amended rules and guidance, giving effect

[160] See, for example the genuineness test in Tier 1 (Entrepreneur) requires an assessment of the "viability and credibility" of business plans and sources of money. Immigration Rule 245 DB (h): *https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system* [Accessed 8 November 2017].

[161] Children's Commissioner, *Family Friendly? The impact on children of the Family Migration Rules: A review of the financial requirements,* August 2015, fn. 126; *Bertram et al,* fn.115.

to the decision in *MM and Others*, are prescriptive in their nature and restrictive in their remit. Article 8 matters are only considered in "exceptional circumstances" resulting in "unjustifiably harsh consequences," where neither phrase is accorded its literal meaning. If Home Office caseworkers grasp that *exceptional* does not require *exceptionality*, the decision-making then progresses to a complex and intricate assessment of *proportionality*.

Couples not meeting the MIR remain segregated, causing significant distress and anxiety to both parties and any dependants. This in turn negatively impacts on potential integration into British society. Applicants have to decipher technical rules and guidance, and overcome stringent tests, to bring alternative sources of funding into play. If initial decisions are unreliable, applicants unlikely to meet the minimum income are, by definition, less resourced to challenge them. Where challenge is possible, the uncertainty and apprehension of ongoing litigation will inevitably affect integration and social inclusion. Where the final outcome is the segregation of families, the chances of ever successfully integrating are significantly reduced. Integration, as emphasised throughout, cannot be reduced to a single quantitative factor. Furthermore, forcing British citizens with partners to rely on single or lone parent incomes potentially increases reliance on welfare. Consequently, the argument for a minimum income requirement cannot be justified by reducing its rationale to matters related to the public purse and neither can it be unproblematically tied to the goal of promoting integration. The MIR can at least be said to be efficacious in one of its stated aims, namely reducing migration. But this is not without irony: the statistical profile here points not to those abusing immigration controls, but to British citizens permanently separated from their partners.[162]

[162] See Impact Statement findings, fn.11.